



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

SEP 18 2007

Ezra Reese, Esq.  
Perkins Coie  
607 14<sup>th</sup> Street, N.W.  
Washington, DC 20005

RE: MUR 5646  
Cohen for New Hampshire and  
John Buchalski, in his official capacity as treasurer

Dear Mr. Reese:

Based on information ascertained in the normal course of carrying out its supervisory responsibilities, on February 3, 2005, the Federal Election Commission found reason to believe that Cohen for New Hampshire and John Buchalski, in his official capacity as treasurer ("Committee"), violated 2 U.S.C. §§ 432(c), 432(h), 434(b), and 439a(b), and knowingly and willfully violated 2 U.S.C. § 441i(e)(1)(A) and 11 C.F.R. § 110.3(d), and instituted an investigation in this matter.

After considering all the evidence available to the Commission, the Office of the General Counsel is prepared to recommend that the Commission find probable cause to believe that violations of 2 U.S.C. §§ 432(c), 432(h), 434(b), and 439a(b), and knowing and willful violations of 2 U.S.C. §§ 434(b) and 441i(e)(1)(A) and 11 C.F.R. § 110.3(d), have occurred.

The Commission may or may not approve the General Counsel's recommendation. Submitted for your review is a brief stating the position of the General Counsel on the legal and factual issues of the case. Within 15 days of your receipt of this notice, you may file with the Secretary of the Commission a brief (ten copies if possible) stating your position on the issues and replying to the brief of the General Counsel. (Three copies of such brief should also be forwarded to the Office of the General Counsel, if possible.) The General Counsel's brief and any brief which you may submit will be considered by the Commission before proceeding to a vote of whether there is probable cause to believe a violation has occurred.

If you are unable to file a responsive brief within 15 days, you may submit a written request for an extension of time. All requests for extensions of time must be submitted in writing five days prior to the due date, and good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

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You may also request an oral hearing before the Commission. See Commission's "Policy Statement Establishing a Pilot Program for Probable Cause Hearings," 72 Fed. Reg. 7551 (Feb. 16, 2007). Hearings are voluntary, and no adverse inference will be drawn by the Commission based on a respondent's decision not to request such a hearing. Any request for a hearing must be submitted along with your reply brief and must state with specificity why the hearing is being requested and what issues the respondent expects to address. The Commission will notify you within 30 days of your request for a hearing as to whether or not the request has been granted.

A finding of probable cause to believe requires that the Office of the General Counsel attempt for a period of not less than 30, but not more than 90 days, to settle this matter through a conciliation agreement.

Should you have any questions, please contact Dawn Odrowski or Ana Peña-Wallace, the attorneys assigned to this matter, at (202) 694-1650.

Sincerely,

*Thomasenia P. Duncan*  
Thomasenia P. Duncan  
General Counsel

Enclosure  
Brief

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1 **BEFORE THE FEDERAL ELECTION COMMISSION**

2  
3 In the Matter of )

4 )  
5 Cohen for New Hampshire and John Buchalski, )  
6 in his official capacity as treasurer )  
7 )

MUR 5646

8  
9 **GENERAL COUNSEL'S BRIEF**  
10

11 **I. INTRODUCTION**

12 This matter arose from information ascertained by the Federal Election Commission  
13 ("The Commission") in the normal course of carrying out its supervisory responsibilities. See  
14 2 U.S.C. § 437g(a)(2). The Commission found reason to believe ("RTB") that Cohen for New  
15 Hampshire and John Buchalski, in his official capacity as treasurer, ("the Committee")  
16 knowingly and willfully violated 2 U.S.C. § 441i(e)(1)(A) and 11 C.F.R. § 110.3(d) by using  
17 funds from Burton Cohen's state senate committee, raised outside the prohibitions, limitations  
18 and reporting requirements of the Federal Election Campaign Act of 1971, as amended ("the  
19 Act"), for start-up expenses for his U.S. Senate campaign. The Commission also found reason to  
20 believe that the Committee violated 2 U.S.C. §§ 434(b) and 432(c) by failing to file accurate  
21 reports with the Commission and failing to keep an account of all of its receipts and  
22 disbursements; violated 2 U.S.C. § 439a(b) as a result of Campaign Manager Jesse Burchfield's  
23 use of campaign funds for personal use; and violated 2 U.S.C. § 432(h) by failing to make  
24 disbursements in excess of \$100 by checks drawn on the Committee's bank account. See Factual  
25 and Legal Analysis to Cohen for New Hampshire dated February 3, 2005.

26 Evidence obtained during the ensuing investigation establishes that the Committee,  
27 through Cohen and Burchfield, spent between \$23,800 and \$25,360 in state campaign funds to  
28 finance the initial expenses for Cohen's federal campaign and that Burchfield knew that using  
29 those funds for a federal election was prohibited. The evidence also establishes that the

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1 Committee, through Burchfield, used approximately \$10,000 in campaign funds for the personal  
2 expenses of its staff, including Burchfield, actions that were facilitated for more than a year by  
3 the absence of effective internal controls in the Committee's operations; that the Committee,  
4 through Burchfield, deliberately failed to disclose \$187,720 in disbursements and misreported  
5 \$117,720 in receipts to make the Committee appear viable by inflating its cash-on-hand; failed to  
6 keep an accurate record of receipts and disbursements; and made cash disbursements in excess of  
7 \$100.

8 Based on the results of the investigation, the General Counsel is prepared to recommend  
9 that the Commission find probable cause to believe that the Committee knowingly and willfully  
10 violated 2 U.S.C. §§ 441i(e)(1)(A) and 11 C.F.R. § 110.3(d); knowing and willfully violated  
11 2 U.S.C. § 434(b) with respect to all reporting violations except those relating to the funds  
12 converted by Jesse Burchfield for his own personal use; and violated 2 U.S.C. §§ 432(c), 432(h),  
13 439a(b) and 434(b) for failing to report the funds Jesse Burchfield converted to his own personal  
14 use.

## 15 **II. BACKGROUND**

16 Burt Cohen first hired Burchfield in March 2002 to manage his campaign for re-election  
17 to the New Hampshire State Senate for a seventh term. After winning that election, Cohen hired  
18 him to manage his U.S. Senate campaign, a prospect they had previously discussed during the  
19 state campaign.<sup>1</sup> Cohen and Burchfield began working on the federal campaign in late  
20 November 2002 and through the first eight months of 2003, the Committee primarily consisted  
21 of only three paid staff members working out of a one room office: Campaign Manager

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<sup>1</sup> Cohen filed a Statement of Candidacy for the 2004 U.S. Senate election on January 16, 2003, naming "Cohen for New Hampshire" as his principal campaign committee, and the Committee filed a Statement of Organization on January 27, 2003.

1 Burchfield, whose duties included handling the Committee's finances and preparing and filing  
2 the Committee's FEC disclosure reports; David Mowrey, placed on the campaign as a Finance  
3 Director by the firm Cunningham Harris & Associates ("CHA"), who handled fundraising; and  
4 Assistant Finance Director Sharon Valdez, who assisted Mowrey and Burchfield. Committee  
5 treasurer John Buchalski had no role in the operation of the campaign except to sign the first two  
6 Committee disclosure reports, which were brought to him by Committee staffers.<sup>2</sup> A fourth paid  
7 staff member was hired in September 2003 as a field director.

8 As the Committee's fundraising lagged, Cohen and Burchfield decided to replace CHA in  
9 or about February 2004 and fired the field director. Ellen Stankiewicz, an experienced fundraiser  
10 recommended by another consultant, replaced Mowrey as Finance Director on March 1, 2004.  
11 Around the same time, the Committee began staffing up, hiring a press secretary, two full-time  
12 field organizers, a scheduler/driver, and another finance assistant for Stankiewicz. Just before  
13 the campaign folded in June 2004, the Committee had fully staffed its field operation with more  
14 than 20 staff members.

15 By June 2004, Cohen had decided to replace Burchfield as campaign manager after  
16 repeated complaints from staff about Burchfield's management of the campaign and lack of  
17 interpersonal skills. In an interview, Cohen explained that he did not inform Burchfield of his  
18 plan, intending to present the new hire as someone to "assist" Burchfield so that Burchfield  
19 would not "quit in a huff and stir up the press." Nevertheless, rumors of Burchfield's  
20 replacement reached lower level staff, and on June 7, 2004, Burchfield sent an e-mail entitled

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<sup>2</sup> It appears that John Buchalski, the Committee's named treasurer, sent Cohen a letter resigning as treasurer on June 14, 2004, shortly after Cohen withdrew from the U.S. Senate race. Neither Cohen nor the Committee has filed the letter or an amended Statement of Organization with the Commission replacing Buchalski with a new committee treasurer. Consequently, absent the required filings, Buchalski still appears in the Commission's records as the Committee treasurer, although Cohen has been signing the Committee's disclosure reports since June 2004.

1 "Goodbye" to Cohen and other campaign staff. He informed them that "expenses for the past  
2 year and half have outpaced our income consistently," that "currently the campaign is broke,"  
3 offered to "provide any help needed to the FEC" and urged them to meet with the campaign's  
4 consultants to "move past this."<sup>3</sup>

5 After they received Burchfield's e-mail, Committee staff and some of its consultants  
6 quickly confirmed the Committee's dire financial condition. Cohen withdrew from the race on  
7 June 10, 2004 and hired counsel and an accounting firm to conduct a forensic audit, initially to  
8 determine if Burchfield had embezzled funds. The Committee first notified the Commission of a  
9 problem in letters responding to a Reports Analysis Division Request for Additional Information  
10 ("RFAI") about the 2004 April Quarterly Report and accompanying the Committee's next  
11 regularly scheduled report, the 2004 July Quarterly Report.<sup>4</sup> The Committee's letters, dated  
12 June 23, 2004 and July 15, 2004, provided little detail, stating only that the Committee was  
13 undergoing a "thorough review of campaign finances and reporting" and that a discovery of a  
14 "significant discrepancy" in its cash on hand necessitated a "reconstruction of certain  
15 transactions." The Committee filed incomplete amendments to its 2004 disclosure reports in  
16 December 2004, then filed comprehensive amendments to all of its disclosure reports on July 1,  
17 2005, four months after it had been notified of the Commission's reason to believe findings and  
18 more than a year after the campaign ended.

19 \_\_\_\_\_  
<sup>3</sup> The next day, Burchfield sent a second e-mail to Cohen in which he admitted that he had kept the campaign's financial situation from Cohen, denied accusations that he had stolen money, and offered to cooperate in any investigation. Burchfield also left a voice-mail message for Cohen in which he apologized to Cohen, expressed his hope that Cohen would continue with the campaign, advised that he was drafting a letter to the FEC for Cohen's approval taking "the blame for all this," and stated "it was all my fault."

<sup>4</sup> The RFAI inquired about incorrect receipt and disbursement figures on the report's summary pages, an incorrect cash balance, and the omission of loans that were disclosed in previous reports.

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**III. ANALYSIS**

**A. THE COMMITTEE KNOWINGLY AND WILLFULLY VIOLATED THE PROHIBITION AGAINST THE USE OF NON-FEDERAL FUNDS TO PAY FOR FEDERAL CAMPAIGN ACTIVITY**

The Committee has admitted that Cohen and Burchfield spent state campaign funds from Cohen's state campaign account, Friends of Burt Cohen, for Cohen's U.S. Senate campaign and that those disbursements were not disclosed in the Committee's first FEC disclosure report. *See* Committee RTB response at 4; *see also* Cohen RTB response at 2-3; Cohen Deposition Transcript ("BC Tr.") at 41, 49, 187-188. All told, Cohen and Burchfield spent between \$23,900-\$25,360 in state campaign funds for the federal campaign. *See* Affidavit of Jesse Burchfield (hereinafter "JB Aff.") at ¶ 13.<sup>5</sup>

The Act, as amended by the Bipartisan Campaign Reform Act of 2002, prohibits a federal candidate, a candidate's agent, and entities established, financed, maintained or controlled by, or acting on behalf of, a candidate from soliciting, receiving, directing, transferring or spending funds in connection with a Federal election unless the funds are subject to the limitations, prohibitions and reporting requirements of the Act. 2 U.S.C. § 441i(e)(1)(A). Moreover, Commission regulations specifically prohibit transfers of funds or assets from a candidate's campaign for a non-federal election to his or her federal campaign. 11 C.F.R. § 110.3(d). This prohibition applies to payments made from a state campaign committee on behalf of a federal campaign as well as to the direct transfer of funds to a federal committee. *See, e.g.*, MURs 4974 (Tiberi for Congress), 5480 (Levetan for Congress), and 5426 (Schultz for Congress).

<sup>5</sup> In his affidavit, Burchfield described the use of state funds as ranging between \$25,358 and \$29,358 because he was unsure which of the salary checks issued to him in November and December 2002 were for his work on the federal rather than the state campaign. JB Aff. ¶ 13. The more accurate figure is likely between \$23,900 and \$25,358 based on Cohen's testimony regarding the 2002 salary checks. *See infra*, note 6.

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1        During Cohen's 2002 state senate re-election campaign, Cohen and Burchfield decided to  
2        raise more money than Cohen likely needed to win re-election so that they could use the excess  
3        funds in a bid for higher office after the election, either Governor of New Hampshire, or most  
4        likely U.S. Senate. *See* JB Aff. ¶ 3-4, 7; BC Tr. at 38-42. Within a month of his re-election to  
5        state senate on November 5, 2002, Cohen and Burchfield began working on his U.S. Senate  
6        campaign, advertising for a fundraiser and interviewing consultants. They also began spending  
7        the excess state funds they had raised to pay the initial expenses for the federal campaign. These  
8        disbursements, made between November 2002 and February 2003, included the first consulting  
9        fee for the Committee's fundraising consultant, CHA, housing costs for Burchfield and the CHA  
10       finance director pursuant to their respective contracts, the salaries of Burchfield and Valdez,  
11       speechwriting assistance, phone line deposits, the purchase of office supplies and postage and  
12       printing costs. JB Aff. ¶ 13; *see also* BC 77-78, 82; Committee RTB response at 4. Cohen and  
13       Burchfield together spent the state funds. They specifically discussed paying CHA's initial fee,  
14       and Burchfield, in his role as campaign manager took care of routine expenses such as office  
15       supplies, printing and postage. JB Aff. ¶ 11; *see also id.* at ¶ 12-13. Because Cohen had sole  
16       signatory authority on the state campaign account, Burchfield prepared checks from the state  
17       account for Cohen's signature. *Id.* at ¶ 9.

18       Cohen and the Committee have specifically acknowledged the use of state funds in 2003  
19       by reporting most, but not all, of the \$19,400 in disbursements as in-kind contributions from the  
20       state committee in the Committee's amended 2003 April Quarterly Report, which was filed after  
21       Respondent's RTB response in this matter. In addition to the 2003 disbursements, between  
22       \$4,500-\$6,000 in state campaign disbursements made in November and December 2002 for  
23       Burchfield's salary and housing allowance were apparently made in connection with the federal



1 campaign since they were made over and above Burchfield's state campaign salary and housing  
2 allowance at a time when Burchfield and Cohen were already working on the federal campaign.<sup>6</sup>

3 During the relevant period, New Hampshire state law permitted individuals, political  
4 committees, and corporations to make contributions of up to \$1,000 to a candidate who had not  
5 agreed to voluntarily limit campaign expenditures, as was the case with Cohen.<sup>7</sup> A limited  
6 review of Cohen's state campaign account indicated that it contained prohibited funds from  
7 corporations and the non-federal accounts of political committees, donations from individuals  
8 who also contributed to the federal committee and whose combined contributions to both  
9 campaigns exceeded the federal contribution limit, and donations from limited liability  
10 companies and non-registered political committees that may have been impermissible under  
11 federal law. Consequently, through Cohen's and Burchfield's spending of state campaign funds  
12 for Cohen's federal election, the Committee effectively received undisclosed funds that were not  
13 subject to the Act's limits, prohibitions, and reporting requirements in violation of 2 U.S.C.  
14 § 441i(e)(1)(A). In addition, these payments violated the prohibition against transfers from a  
15 non-federal campaign to a federal campaign as set forth in 11 C.F.R. § 110.3(d).

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<sup>6</sup> The 2002 disbursements are comprised of \$4,500 in salary payment to Burchfield in December and a \$1,500 payment in November to Burchfield's landlord for the apartment he occupied during the federal campaign. Like Burchfield, Cohen was uncertain how much he had agreed to pay Burchfield during this period, but he testified that he agreed to pay Burchfield's \$2000 monthly state salary through December 2002, may also have paid him a state campaign bonus, and initially agreed to pay him between \$3,000-\$3,500 in salary plus housing costs for the federal campaign. See BC Tr. at 15-18; 51-52; 177. When reviewing copies of these checks during his deposition, however, Cohen questioned whether some of the signatures were his, although he testified that at least one of checks bearing a questionable signature was authorized. See BC Tr. at 172-177. Based on Cohen's testimony and the fact that he and Burchfield were already working on the federal campaign during this period, it appears likely that at least \$3,000 of the salary payments and the \$1,500 housing payment are attributable to the federal campaign.

<sup>7</sup> See N.H. Rev. Stat. Ann. § 664:4, V. Corporations are permitted to contribute within the same limit as individuals based on a 1999 U.S. District Court decision ruling that New Hampshire's prohibition on corporate contributions was unconstitutional. See *Kennedy v. Gardner*, 1999 WL 814273 (D.N.H. Sept. 30, 1999) (No. CV 98-608-M) and Opinion Letter dated June 6, 2000 from Deputy Attorney General to William M. Gardner, Secretary of State.

1           Therefore, the General Counsel is prepared to recommend that the Commission find  
2           probable cause to believe that Cohen for New Hampshire and John Buchalski, in his official  
3           capacity as treasurer, violated 2 U.S.C. § 441i(e)(1)(A) and 11 C.F.R. § 110.3(d). In addition,  
4           the General Counsel is prepared to recommend that the Committee's violations were knowing  
5           and willful.<sup>8</sup>

6           Both Cohen and Burchfield acknowledge that they agreed to use state campaign funds to  
7           help start up Cohen's U.S. Senate campaign and, in fact, raised more funds than were likely  
8           needed to win re-election at the state level for use in a run for either U.S. Senate or Governor.  
9           Burchfield has also admitted that he knew at the time that using state campaign funds for a  
10          federal campaign was prohibited by law – both through his own research and as a result of  
11          consulting with CHA principal, L.A. Harris, an experienced fundraising consultant – and that he  
12          deliberately omitted the federal expenses paid with state funds from the Committee's first FEC  
13          report, the 2003 April Quarterly Report, because he knew that using the state funds was  
14          prohibited. JB. Aff. ¶¶ 6, 10, 17.<sup>9</sup>

15          Because a political committee is an artificial entity that can only act through individuals,  
16          the Committee can be held liable for Burchfield's knowing and willful conduct committed within

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<sup>8</sup> The phrase knowing and willful indicates that "actions [were] taken with full knowledge of all of the facts and a recognition that the action is prohibited by law." 122 Cong. Rec. H 2778 (daily ed. May 3, 1976); see also *Federal Election Comm'n v. John A. Dramesi for Cong. Comm.*, 640 F. Supp. 985, 987 (D.N.J. 1986) (distinguishing between "knowing" and "knowing and willful"). A knowing and willful violation may be established "by proof that the defendant acted deliberately and with knowledge" that an action was unlawful. *United States v. Hopkins*, 916 F.2d 207, 214 (5<sup>th</sup> Cir. 1990).

<sup>9</sup> Cohen testified that he left it up to Burchfield to set up the procedures for handling the Committee's funds, gave him significant control over handling and tracking the Committee's finances, and delegated to Burchfield the responsibility for learning and complying with FEC law, including preparing and filing disclosure reports. See BC Tr. at 110-11 (financial procedures); BC Tr. at 58-59 and 113-115, and JB Aff. ¶ 15 (handling finances); and BC Tr. at 41 and 97, and JB Aff. ¶ 16 (compliance and reporting). Cohen testified that at the time Burchfield and Cohen began spending Cohen's state campaign funds for the federal election, Cohen did so relying on Burchfield's assurances that doing so was "okay" and did not question the basis for Burchfield's counsel or seek the guidance of anyone else. BC Tr. at 41-44. Burchfield, however, has claimed that he advised Cohen at the time that state campaign spending on behalf of a federal campaign was prohibited by law. JB Aff. ¶ 6.

1 the scope of his employment and in the service or, and for the benefit of, the Committee.<sup>10</sup> See,  
2 e.g., MUR 2602 (Rhodes).<sup>11</sup> Importantly, Burchfield was the Committee's highest-ranking  
3 employee, who was responsible for virtually all campaign operations and shared with Cohen  
4 decision-making responsibility for making disbursements on behalf of the Committee.  
5 Burchfield and Cohen made the impermissible disbursements from the state campaign account  
6 for the benefit of the Committee, and Burchfield did so with knowledge that using the state funds  
7 was prohibited. Accordingly, the General Counsel is prepared to recommend that the  
8 Committee, through Burchfield, knowingly and willfully violated 2 U.S.C. § 441i(e)(1)(A) and  
9 11 C.F.R. § 110.3(d).

10 **B. THE COMMITTEE VIOLATED THE ACT'S PROHIBITIONS AGAINST**  
11 **THE PERSONAL USE OF CAMPAIGN FUNDS AND THE MAKING OF**  
12 **CASH DISBURSEMENTS OVER \$100**  
13

14 As part of his duties as Cohen's campaign manager, Burchfield had wide-ranging control  
15 over the Committee's finances, including control over the Committee's bank card. The evidence  
16 demonstrates that Burchfield converted over \$10,000 in campaign funds for his own personal use  
17 and for the use of at least two campaign staffers. Many of these disbursements, as well as other  
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<sup>10</sup> A principal is liable for the acts of its agents committed within the scope of his or her employment. See Restatement (Second) of Agency § 228(1) (explaining that an agent's conduct is within the scope of his authority if it is the kind he is employed to perform, takes place within authorized time and space limits and is actuated, at least in part, by a purpose to serve the principal). See also *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-40 (1989) (applying common law agency principles where federal statute does not define scope of employment).

<sup>11</sup> In *Rhodes*, the Commission found probable cause that the Rhodes Committee had knowingly and willfully violated the Act through the actions of its Finance Chair/Assistant Treasurer John O'Neill that were undertaken in service of the Committee. Mr. O'Neill had accepted corporate contributions and converted them into contributions in the name of another. He also created fictitious contributor cards and tried to prevent the campaign manager from sending thank-you letters. It appeared that O'Neill's purpose was to "meet the fundraising goals and needs of the Rhodes campaign." MUR 2602 General Counsel's Report dated February 2, 1994, at 6. Despite the Rhodes Committee's contention that it should not be held liable for O'Neill's illegal acts, the Commission found that he had acted within the scope of his financial duties and the authority granted to him by the Committee. *Id.* In addition, the Commission's knowing and willful findings were supported by the fact that O'Neill was "not supervised or held accountable on a regular basis." *Id.* at 7.

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1 disbursements for campaign-related expenses, were made in cash amounts exceeding \$100.

2 The Act prohibits the conversion of campaign contributions to personal use. 2 U.S.C.

3 § 439a(b). This provision prohibits "any person" from using campaign funds for personal use.

4 *Id.*; 2 U.S.C. § 431(11) (defining "person" under the Act to include individuals and committees).

5 The Act sets forth examples of *per se* instances of improper personal use, such as using

6 campaign contributions or donations for clothing purchases, vacations, and non-campaign related

7 entertainment expenses. *See* 2 U.S.C. § 439a(b)(2)(A)-(I); *see also* 11 C.F.R. § 113.1(g). In

8 addition, the Act considers a contribution or donation improperly converted for personal use if

9 "the contribution or amount is used to fulfill any commitment, obligation, or expense of a person

10 that would exist irrespective" of the campaign. 2 U.S.C. § 439a(b)(2). Finally, the Act prohibits

11 cash disbursements from committee depositories in amounts exceeding \$100. 2 U.S.C. § 432(h).

12 While Burchfield admits that he used the Committee's bankcard to pay for \$4,681 in

13 personal expenses, he has indicated that another \$9,500 in bank card transactions, primarily

14 ATM withdrawals that the Committee's auditor identified as possible personal use

15 disbursements, were for a mixture of his personal expenses and miscellaneous campaign

16 expenses such as office supplies, stamps, and cash payments to student interns.<sup>12</sup> Burchfield

17 estimated that 60% of the \$9,500 in disbursements (\$5,700) was used for his personal expenses

18 and 40% for campaign expenses.<sup>13</sup> Two campaign staff members confirmed that Burchfield

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<sup>12</sup> Burchfield's disbursements for personal expenses included electronic transfers to a PayPal account that Burchfield used to purchase personal items, debit card disbursements for adult websites and pet supplies, and debit card disbursements and ATM withdrawals for rental cars, a hotel and cash while he was on vacation. JB Aff. ¶ 26.

<sup>13</sup> Burchfield justified his use of campaign funds to pay personal expenses through these ATM withdrawals and debit card transactions as a way to make up for the Committee's failure to pay his full salary throughout the campaign. JB Aff. ¶¶ 24-25. He asserted that the total amount attributable to his personal use did not exceed the salary shortfall. However, Burchfield and Cohen have provided conflicting testimony as to Burchfield's salary level and no documentation of Burchfield's salary agreement apparently exists.

1 sometimes gave them cash to pay for miscellaneous campaign-related expenses such as lunch  
2 and repairs to a video camera.

3 In addition to the portion of the bank card transactions Burchfield used to pay for  
4 personal expenses, two campaign staff members each received clothing allowances of \$200 by  
5 Committee checks signed by Cohen. Clothing purchases are specifically included as *per se*  
6 personal use violations since staffers' clothing expenses would exist irrespective of the  
7 campaign.

8 The use of Committee funds for staffers' clothing constitutes a violation of Section  
9 439a(b) by the Committee. In addition, the lack of documentation for the ATM transactions,  
10 used for a mixture of personal use and campaign expenses, illustrates the purpose behind the  
11 Act's requirement that political committees make disbursements in excess of \$100 by check.  
12 2 U.S.C. § 432(h). Twenty-nine of the ATM withdrawals identified by the Committee's auditors  
13 were in amounts over \$100. Therefore, the General Counsel is prepared to recommend there is  
14 probable cause to believe that Cohen for New Hampshire and John Buchalski, in his official  
15 capacity as treasurer, violated 2 U.S.C. §§ 439a(b) and 432(h).

16 **C. THE COMMITTEE KNOWINGLY AND WILLFULLY FILED**  
17 **INACCURATE DISCLOSURE REPORTS AND FAILED TO MAINTAIN**  
18 **APPROPRIATE RECORDS AS REQUIRED BY THE ACT**  
19

20 A review of the Committee's bank records and the Committee's original and amended  
21 reports filed with the Commission, show that the Committee, through Burchfield, failed to  
22 disclose disbursements totaling \$187,720 in five reports filed with the Commission covering the  
23 period of January 1, 2003 through March 31, 2004, representing about 41% of the Committee's  
24 total disbursements as reported in its final amended reports for that time period. In addition, the  
25 Committee, through Burchfield, misreported \$117,720 in receipts by under-reporting \$6,590 in

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1 receipts in the 2003 July Quarterly Report, over-reporting a total of \$26,139 in receipts in the  
2 2003 April, October and Year-End Reports, fabricating or inflating \$49,900 in itemized  
3 contributions and failing to itemize 119 contributions totaling \$35,090 in the 2004 April  
4 Quarterly Report.<sup>14</sup> In total, the reporting violations amount to \$305,440.

5 Burchfield has admitted that he intentionally filed inaccurate disclosure reports with the  
6 Commission on behalf of the Committee. According to Burchfield, he submitted inaccurate  
7 information primarily to inflate the Committee's cash-on-hand and make the Committee appear  
8 viable. JB Aff. ¶ 20. In further explaining his actions in an interview, Burchfield stated that very  
9 few people took Cohen's candidacy seriously and money was the only way to show that Cohen  
10 could be a viable candidate. Secondly, a small percentage of Burchfield's misreporting  
11 resulted from his attempt to hide the use of state campaign funds at the beginning of the U.S.  
12 Senate campaign and the personal use of campaign funds throughout the campaign. JB Aff. ¶  
13 21; *supra* Sections III.A and B.

14 The Act requires that political committees file disclosure reports that accurately reflect a  
15 committee's cash on hand and disclose all contributions and disbursements, including the  
16 identification information for contributions and disbursements exceeding \$200. *See*  
17 2 U.S.C. § 434(b). A political committee is ultimately responsible for filing accurate and timely  
18 disclosure reports with the Commission and may be held liable for reporting violations resulting  
19 from the acts of its employees and agents. In this regard, the Commission has considered  
20 whether the employee was acting within the scope of his or her employment, and, if the  
21 employee was acting outside his or her employment, whether the Committee maintained

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<sup>14</sup> The \$49,900 in fabricated or inflated contributions consisted of 22 fictitious contributions, 11 contributions with inflated amounts and inaccurate dates, and two contributions that were received outside the reporting period. Except for the fictitious contributions, much of the inflating of receipts appears to have resulted from the inclusion of contributions received after the end of a particular reporting period but before the filing date.

1 adequate safeguards and internal controls. *See, e.g.*, MUR 5721 (Lockheed Martin Employees  
2 PAC).<sup>15</sup>

3 The evidence shows that Burchfield was acting within the scope of his employment when  
4 he made almost all of the reporting errors noted above. Cohen acknowledged during his  
5 deposition that he gave Burchfield broad authority to handle the Committee's finances and file  
6 disclosure reports with the Commission (BC Tr. at 110-111; 113-116; 101-103), and almost all  
7 of Burchfield's misreporting was undertaken to benefit the Committee by making Cohen's  
8 campaign appear more viable. Indeed, the deliberately inaccurate disclosure reports that inflated  
9 the Committee's cash on hand enabled the Committee to continue operating despite its consistent  
10 failure to meet its fundraising goals.

11 Nevertheless, the evidence also shows the absence of any adequate safeguards or internal  
12 controls over the Committee's finances, which contributed to the reporting violations. Cohen  
13 testified that he left it up to Burchfield to set up the procedures for handling the Committee's  
14 funds and acquiesced when Burchfield "turned away" a CPA who volunteered to keep the  
15 Committee's books. *Id.* at 110, 101-102. Accordingly, Burchfield picked up the daily mail,  
16 including contribution checks, from the Committee Post Office Box, checked Internet  
17 contributions, deposited contribution checks, prepared checks for Cohen's signature, moved  
18 funds between the Committee's two bank accounts, and kept possession and control over the  
19 Committee's bank card, checkbook, and bank statements. JB Aff. ¶ 15. *See also* BC Tr. at 58-  
20 59, 110-111 and 113-116. He alone tracked the Committee's expenses. BC Tr. at 118. In setting  
21 up the Committee's procedures, Burchfield created a system that lacked basic internal controls

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<sup>15</sup> *See also* MUR 2602 (Rhodes), note 11, *supra*.

1 such that only Burchfield handled the Committee's receipts and disbursements and prepared FEC  
2 disclosure reports.<sup>16</sup>

3 The only internal control over Burchfield's broad authority to handle the Committee's  
4 finances was Cohen's retention of sole signature authority on the Committee's checks.<sup>17</sup> BC Tr.  
5 at 54-55. Yet, even that control was ineffective because Cohen turned over the Committee's  
6 bank card with its ATM, debit and check card functions to Burchfield and as a practical matter,  
7 gave Burchfield authority to routinely transfer funds between the Committee's two accounts, a  
8 checking account and money market account, without requiring Cohen's approval. *Id.* at 53-58.  
9 Cohen testified that he told Burchfield when they opened the Committee's accounts that the bank  
10 card was to be used only for out-of-the-ordinary campaign expenses such as travel for  
11 fundraising events. Yet Cohen was unable to adequately explain why he did not then keep  
12 control or possession of the card instead of giving it to Burchfield.<sup>18</sup> *Id.* at 60-61. Cohen further  
13 testified he did not think the bank card was to be used for routine expenses such as supplies, *Id.*  
14 at 56-57, but Burchfield, Valdez, and Stankiewicz, have stated the bank card was openly used to  
15 buy office supplies at Staples and Office Max.

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<sup>16</sup> The Commission recently created a safe harbor in embezzlement matters for political committees that maintain adequate internal controls. *See Statement of Policy: Safe Harbor for Misreporting Due to Embezzlement*, 72 Fed. Reg. 16,695 (April 5, 2007); *See also Commission Policy Statement Regarding Internal Controls* (approved by the Commission on March 22, 2007).

<sup>17</sup> Despite Cohen's retention of signature authority, Burchfield stated in interviews that he signed Cohen's name to checks for regularly occurring campaign expenses, such as salary payments, housing negotiated as part of staff compensation packages and payments to a media consultant and website operator, because they needed to be timely issued and to avoid distracting Cohen from making fundraising calls. *See also* JB Aff. ¶ 15. This practice would have been uncovered had another staffer besides Burchfield reconciled the Committee's records with the bank statements and disclosure reports. An examination of the Committee checks indicates that virtually all of the checks on which Cohen's signature appears questionable were apparently for campaign-related expenses.

<sup>18</sup> When asked why he did not then keep possession of the card, Cohen gave several responses. He first replied, "Good question. I like to keep a thin wallet," then stated, "I don't know," and finally answered, "I'm just thinking here. Just give me a minute here. I have some vague recollection of Jesse saying that he wanted to keep the card because there may be those times when I'm busy or out or something . . . but that's just a vague memory." BC Tr. at 61.

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1       The Committee's unchecked delegation to Burchfield to handle the campaign's finances  
2 and FEC reporting requirements was particularly reckless given indications that Burchfield was  
3 careless with reporting. First, after catching a mathematical error in one of the disclosure reports  
4 Burchfield prepared for the state committee, Cohen testified that he subsequently double-  
5 checked the state reports. BC Tr. at 28-31. He took no similar actions to ensure that the FEC  
6 reports were checked, however. *Id.* at 103. Indeed, had anyone done so, they would have  
7 discovered mathematical errors in nearly every Committee disclosure report that Burchfield filed  
8 with the FEC. Second, the inclusion of disbursements clearly related to the federal campaign  
9 and the omission of others in a May 5, 2003 state campaign report, which Burchfield prepared  
10 and Cohen reviewed and signed, was another early indicator of problematic reporting that should  
11 have prompted specific questions by Cohen. See BC Tr. at 158-162. Finally, Cohen testified  
12 that he learned through a newspaper article that the Committee had filed the 2003 Year-End  
13 Report late. BC Tr. at 103-105. In fact, the Committee paid the Commission a fine for that late  
14 report through the Administrative Fines Program. See AF 1089. In spite of these warning signs,  
15 the Committee continued to operate without effective controls.<sup>19</sup>

16       For all of these reasons, the General Counsel is prepared to recommend that the  
17 Commission find probable cause to believe that Cohen for New Hampshire and John Buchalski,  
18 in his official capacity as treasurer, violated 2 U.S.C. § 434(b). In addition, because almost all of  
19 the intentional misreporting committed by Burchfield was undertaken for the Committee's

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<sup>19</sup> Further, after most, but not all, of the reporting violations at issue took place, the Committee declined to implement financial controls specifically recommended by consultant Rose Bryan, who was hired to evaluate the Committee's fundraising operation after CHA was fired. Bryan recommended in February 2004 that Valdez be given the bank statements each month so that she could reconcile the campaign's accounting records with them to ensure the Committee's accounting records matched what was in the bank and so the FEC reports would be accurate. However, Burchfield ignored Valdez's repeated requests for the bank statements. Bryan also recommended that Valdez, and not Burchfield, pick up the mail that included contribution checks. That advice was also ignored.

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1 benefit, and because the Committee delegated responsibility for almost every aspect of the  
2 Committee's operation to Burchfield, failed to employ appropriate safeguards and internal  
3 controls, and, in effect, showed reckless disregard for the integrity of the Committee's finances  
4 and disclosure reports, the General Counsel is prepared to recommend that the Commission find  
5 probable cause to believe that, through Burchfield, Cohen for New Hampshire and John  
6 Buchalski, in his official capacity as treasurer, knowingly and willfully violated 2 U.S.C.  
7 § 434(b) with respect to all reporting errors discussed above except the approximately \$10,000 in  
8 reporting errors resulting from Burchfield's conversion of campaign funds to his own personal  
9 use. With respect to the failure to report the funds Burchfield converted to his own personal use,  
10 the General Counsel is prepared to recommend that the Commission find probable cause to  
11 believe that the Committee violated 2 U.S.C. § 434(b) on a non-knowing and willful basis.

12 Finally, the evidence shows that the Committee failed to keep an account of all  
13 disbursements. The Act requires that treasurers keep an account of the name, address, date,  
14 amount, and purpose of disbursements, including a receipt, invoice or cancelled check for  
15 disbursements in excess of \$200. 2 U.S.C. § 432(c)(5). Although Burchfield was responsible for  
16 maintaining an account of the name, address, date, amount, and purpose of all of the  
17 Committee's disbursements, Burchfield admitted that he often "lost receipts" and cited "poor  
18 recordkeeping" as a contributing factor to the misreporting in his affidavit. JB Aff. ¶ 20. The  
19 fact that the Committee could not specifically describe the purposes of its disbursements in the  
20 report it filed with the Commission shortly after Burchfield left the campaign illustrates that the  
21 records that they needed were not available.<sup>20</sup> Accordingly, the General Counsel is prepared to

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<sup>20</sup> The Committee reported the purpose of about \$122,000 in disbursements as "information requested" or "expenses" in its original 2004 July Quarterly Report.

recommend that there is probable cause to believe that Cohen for New Hampshire and John Buchalski, in his official capacity as treasurer, violated 2 U.S.C. § 432(c).

**IV. GENERAL COUNSEL'S RECOMMENDATIONS**

Find probable cause to believe that Cohen for New Hampshire and John Buchalski, in his official capacity as treasurer, violated 2 U.S.C. §§ 432(c), 432(h) and 439a(b); knowingly and willfully violated 2 U.S.C. §§ 441i(e)(1)(A) and 11 C.F.R. § 110.3(d); knowing and willfully violated 2 U.S.C. § 434(b) with respect to all reporting violations except those relating to the funds converted by Jesse Burchfield for his own personal use; and violated 2 U.S.C. § 434(b) for failing to report the funds Jesse Burchfield converted to his own personal use.

9/18/09  
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